NO. 80-1126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE TAGGART CORPORATION, STANLEY M. KANSAS AND CLAIRE JEAN KANSAS

Petitioners,

v.

E. ROBERT EFROS, JAMES A. MARKLE, WILLIAM K. ROBINSON, OLD SECURITY LIFE INSURANCE COMPANY, DURHAM LIFE INSURANCE COMPANY, SECURITY INSURANCE SERVICES, AND LIFE AND HEALTH BENEFITS ADMINISTRATION, INC.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE OF JAMES A. MARKLE AND LIFE AND HEALTH BENEFITS ADMINISTRATION, INC.

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TABLE OF CONTENTS

PAGE

Table of Authorities ii

Citations to Opinions Below 2

Statement of the Case 2

Counter Statement of the Facts 2

Summary of Argument 4

Reasons for Denying Writ 6

I. THE DECISION OF THE FIFTH CIRCUIT WAS CORRECT AND IN LINE WITH PREVIOUS CASES CITED BY THE COURT.

II. THE APPELLANTS HAVE AN ADEQUATE REMEDY IN THE STATE COURTS AND ARE CURRENTLY PURSUING THAT REMEDY.

III. THERE IS NO CONFLICT AMONG THE CIRCUITS AND THE OPINION OF THE FIFTH CIRCUIT IN QUESTION IS IN ACCORD WITH THE SEVENTH CIRCUIT.

Conclusion 11

Certificate of Service 12

TABLE OF AUTHORITIES

PAGE

STATUTES:

Deceptive Trade Practices — Consumer Protection Act, Texas Business and Commerce Code, § 17.41 et seq. (West 1973) 5

Employee Retirement Income Security Act of 1974 (ERISA), 29 USC § 1001, et seq. 6

Insurance Code of the State of Texas, V.A.T.S. article 3.50 § 1(1), 5 and article 3.51-6 § 1(1), (3) (West 1963) 2

CASES:

Bell v Employer Security Benefits Association, D. C. Kan. 1977, 437 F. Supp. 382 6

Magnum Import v Coty, 262 U.S. 159, 163 (1923) 10

Private Medical Care Foundation, Inc. v Califano, 451 F. Supp. 450, 461 (W.D. Okla. 1977) 7

Wayne Chemical, Inc. v Columbus Agency Service Corp., 567 F. 2d 692 (7th Cir. 1977) 6, 10

LEGISLATIVE HISTORY:

H. R. Rep. No. 94-1785, 94th Cong., 2d Sess. 48 (1977) 7

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RESPONSE OF LIFE AND HEALTH BENEFITS ADMINISTRATION, INC. AND JAMES A. MARKLE

LIFE AND HEALTH BENEFITS ADMINISTRATION, INC., (LHBA) and JAMES A. MARKLE, submit this response to the Petition for Writ of Certiorari filed by The Taggart Corporation, Stanley M. Kansas and Claire Jean Kansas seeking review of the Fifth Circuit's decision in 617 F.2d 1208. The basis for the Court's jurisdiction and the statutes involved

are set forth in the petition filed by The Taggart Corporation, et al.

CITATIONS TO OPINIONS BELOW

The judgment and opinion of the District Court is reported at 475 F. Supp. 124. The opinion of the United States Court of Appeals for the Fifth Circuit dated May 30, 1980 (Circuit Judges, Hill, Garza and Clark) is reported at 617 F.2d 1208. That opinion is incorrectly cited by Petitioner as "F.2d 6011".

STATEMENT OF THE CASE

Petitioners' statement of the Case is essentially correct and needs no further amplification.

COUNTER STATEMENT OF THE FACTS

The Security Multiple Employers Trust (SMET) was established in 1975 to provide an opportunity for small employers to offer life and health insurance to their employees.

This marketing vehicle was made possible by the Insurance Code of the State of Texas, V.A.T.S., article 3.50 §§ 1(1), (5) and article 3.51-6 §§ 1(1), (3) (West 1963).

All policy forms, certificates, marketing material, and enrollment forms are filed with the Insurance Department of the State of Texas and approved by them in compliance with the State Insurance Code.

On December 18, 1975, the Taggart Corporation made written application to the SMET on a subscription agreement and their sole employee, STANLEY KANSAS, submitted an enrollment card for himself

and his family, and coverage was extended based on the application.

On October 17, 1976, son Brian was admitted to the hospital for a strep infection and a claim of $587.47 was paid.

On December 27, 1976, Mrs. Kansas was admitted to the hospital for the first of three (3) confinements. The second confinement commenced on January 12, 1977, for a vein stripping and the third was on February 28, 1977, for a possible pulmonary embolism. The amount of the claims were: $510.30 for the first claim, $1,298.77 for the second claim, and $429.05 for the third claim, or a total of $2,238.12.

However, only the first claim of $510.30 would be payable under the terms of the policy since the second claim was for "elective surgery" and therefore was excluded by the terms of the certificate of coverage, and the third confinement was in relation to the elective surgery.

In routine investigation of Mrs. Kansas' claim, medical records were requested from the hospital. Upon examination of these records, it was found that Mrs. Kansas had a long history of varicose veins and a previous vein-stripping which was not reported on the application for insurance coverage with the SMET. Further investigation revealed that Mrs. Kansas had been treated for a leg injury in 1973 and "busted veins" in 1975, two months prior to the submission of the application for coverage. None of this medical history was reported on the enrollment card as required.

On June 24, 1977, Mr. Kansas' dependent coverage was cancelled for misstatement on the medical portion

of the application submitted for coverage. All dependents had to be terminated because of a "true composite rating system", an average family rate which covers all dependents. Under this rating system, when it becomes necessary to cancel coverage for one dependent, all dependent coverage must be cancelled.

After the termination of dependent coverage, a claim with a possible liability to the insurance company was submitted on son Brian, in the amount of $229.71 and was denied due to termination of dependent coverage.

Mr. Kansas' insurance was terminated effective April 31, 1977, for non-payment of premium.

The Taggart Corporation and Mr. Kansas then filed this suit, claiming violations of ERISA and other breaches of fiduciary duty by the administrator of the Trust, Life and Health Benefits Administration, Inc., (LHBA).

SUMMARY OF ARGUMENT

The simple fact of this case is that it is a claim by a purchaser of insurance against an insurance carrier for not paying a claim and cancelling a policy because of misstatement on the application. If the appellants prove that the claim should have been paid and the policy not cancelled, then they will prevail in the state court. If, on the other hand, the evidence shows that there was a misstatement and that the claim was properly denied and the coverage properly cancelled, then they will lose.

This is in essence a classic case between a policyholder and an insurance carrier where the rights and remedies of the policyholder are determined by state

law. There is no valid reason or justification for the application of ERISA to these facts.

The District Court and the Court of Appeals for the Fifth Circuit found no policy or legal reasons for the imposition of federal jurisdiction based upon these facts under ERISA.

The issue presented by the Petition is of such minor importance in the overall structure of ERISA and the policy reasons for its implementation, that consideration by the Court is not essential. The decision of the Court of Appeals for the Fifth Circuit was correct and fully in accord with other cases which have interpreted the same provisions of ERISA, and which have found no basis for jurisdiction.

There is no basis for Petitioner's claim that the decision below will have a "devastating impact" on the rights and protection granted by Congress to Employee Benefit Plans, or Petitioner's claim that trusts such as the SMET, if not properly controlled by ERISA, will be left unchecked by federal or state law.

The opinion below clearly points out that appellants will be free to pursue their insurance claims in an appropriate state court. (Appendix 2, Appellants Petition, page A-18) As a matter of fact, the Appellants are currently pursuing such a claim in the state courts, and are claiming a right of recovery under state law of treble damages and attorneys fees, pursuant to the Texas Deceptive Trade Practices — Consumer Protection Act. Texas Business and Commerce Code, § 17.41 et seq. (West 1973)

REASONS FOR DENYING WRIT

I.

THE DECISION OF THE FIFTH CIRCUIT WAS CORRECT AND IN LINE WITH THE PREVIOUS CASES CITED BY THE COURT.

The first requirement that the Appellant had to meet in order to establish that there is jurisdiction under ERISA, is that there is an "employee benefit plan". Employee Retirement Income Security Act of 1974 (ERISA) 29 USC § 1001, et seq. The court below correctly found that there was no such "plan".

First, the Court below agreed with the District Court and the Secretary of Labor, who filed an Amicus Brief, that SMET was neither established nor maintained by a statutory "employer" or "employee organization" and hence falls without the scope of ERISA.

The lower Court's opinion in this case does not foreclose ERISA protection to beneficiaries under a proper qualifying ERISA plan. The Court merely held that under the facts in this case the Taggart Corporation did not have such a plan.

The Court below cited with approval the decisions in *Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 567 F.2d. 692 (7th Cir. 1977) and *Bell v. Employee Security Benefit Association*, 437 F. Supp. 382 (D. Kan., 1977), which were also cited by the District Court.

In examining the legislative history of the Act, the court noted that where:

> "The venture was established and is maintained by entreprenuers for the purpose of marketing products or services to other. . . . [Such an en-

> terprise is neither] established or maintained by the appropriate parties to confer ERISA jurisdiction." citing H. R. Rep. No. 94-1785, 94th Cong., 2d Sess. 48 (1977), as quoted in *Private Medical Care Foundation Inc. v. Califano*, 451 F. Supp. 450, 461 (W. D. Okla. 1977) (Appendix 2, Appellants Petition p. A-15)

The Court then rejected the position of the Secretary of Labor that Taggart Corporation's "subscription to SMET" itself "established a single employer welfare plan". The Court correctly pointed out that the history, structure and purpose of ERISA was not to regulate "bare purchases of health insurance, where the purchasing employer neither directly nor indirectly owns, controls, administers or assumes responsibility for the policy or its benefits." (Appendix 2, Appellants Petition, p. A-16)

Appellants argue, on the other hand, that they do assume such responsibility by the payment of premiums and administrative costs. This argument escapes all logic. If this argument was valid, then an insurance policyholder in Los Angeles who paid a premium for his coverage to an insurance company in New York City could argue that he "assumes responsibility for the policy or its benefits."

The Appellant then continues the strained logic by stating that the Taggart Corporation controls the policy through the trust agreement which gives the Taggart Corporation and other employees the power to replace the trustees and even terminate the trust. The District Court opinion clearly disposes of this argument by pointing out that:

"There is nothing in the pleadings and affidavits of the Plaintiffs to suggest that the trust agreement itself was ever reviewed or signed by anyone on behalf of the subscribing Taggart Corporation. . . . The requisite intent or awareness on the part of the Taggart Corporation in the establishment, maintenance and participation in a plan intended to be for the benefit of its employees is lacking herein. . . . The transaction simply involves the purchase of insurance by Plaintiff, STANLEY M. KANSAS, for himself and his family. . . . " (Appendix 1, Appellants Petition, pp. A-8, 9)

II.

THE APPELLANTS HAVE AN ADEQUATE REMEDY IN THE STATE COURTS AND ARE CURRENTLY PURSUING THAT REMEDY.

Appellant recognizes the accuracy of the statement by the Court of Appeals in its opinion that its decision leaves them free to pursue their insurance claim in the appropriate state court, but then alleges that it does not apply to Appellants "present claim regarding a breach of fiduciary duty which is not regulated by state insurance laws." This statement by the Appellant should show to the Court the very "narrow" nature of this appeal and the limited application of the point presented.

Appellants do not describe what terrible fate will befall them if they only prevail in the state Court on their insurance claim and not on their claim for breach of fiduciary duty. Nor do they explain why the Court's statement does not apply to their claim of breach of fiduciary duty, since such a claim has historically been recognized in the courts of the State of Texas.

Appellants claim that there is no remedy under state insurance law for a breach of fiduciary duty. As a matter of fact, however, the Plaintiffs alleged in Paragraph XV of their Original Complaint filed in the Federal District Court that they were "damaged by Defendants misrepresentations and breach of its fiduciary duty to Plaintiffs. . . ." and that the "Texas Business and Commerce Code, Section 17.50 authorizes in such circumstances that Plaintiff is entitled to and should be awarded three times the amount of Plaintiffs actual damages. . . . and reasonable attorney's fees. . . ."

Not only does the Appellant have a remedy, he has a cause of action for treble damages and attorney's fees!

Furthermore, the Appellants are currently pursuing their claim in the state court as the Fifth Circuit opinion expressly allowed them to do. On November 21, 1977 the Appellants filed a suit in the 215th Judicial District Court of Harris County, Texas making essentially the same claims as made in the Original Complaint filed herein. The Plaintiffs Original Petition in the state court also includes the claim for treble damages and attorney's fees under the Texas Deceptive Trade Practices Act, as well as the claim of "breach of fiduciary duty" under the Texas Business and Commerce Code, § 17.50.

Plaintiffs even claim in their state court suit that "the Defendants actions have been in violation of the Insurance Code of the State of Texas and regulations promulgated thereunder." At the same time the appellants are making these claims in the state court, they are representing to this Honorable Court, that

"the Fifth Circuit Court of Appeals is denying Appellants only avenue of redress. . . ." (Appellants Petition p. 9) and that the "Court of Appeals has deprived Appellant of his only recourse as to the breach of fiduciary duty herein to be determined." (Appellants Petition p. 15)

III.

THERE IS NO CONFLICT AMONG THE CIRCUITS AND THE OPINION OF THE FIFTH CIRCUIT IN QUESTION IS IN ACCORD WITH THE SEVENTH CIRCUIT.

The decision has no serious or important social consequence to the nations employers or employees since the Courts aren't refusing to take jurisdiction over valid ERISA plans. This was a mere insurance transaction with more than ample remedies for any wrongful conduct under state law.

More importantly, there is no conflict among the circuits on this issue. As a matter of fact, the only other decision of an appellate court on this question is the opinion of the 7th Circuit in *Wayne Chemical, Inc. v. Columbus Agency Service Corporation, supra* which is in accord with the opinion of the Fifth Circuit and was cited by both the Fifth Circuit and the District Court.

As Chief Justice Taft wrote in *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923):

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those Courts in the nine circuits, and, second, to bring up cases involving questions of

> importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

This case does not meet either requirement suggested by Chief Justice Taft.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing Response to Petition for Writ of Certiorari has been forwarded to Mr. Sam Rowland, 333 West Loop North, Suite 218, Houston, Texas 77024, on this 5th day of March, 1981.

DALE WOOTTON